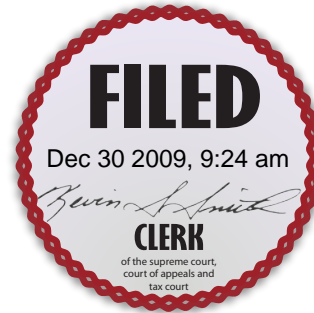


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANTS:

DONALD E. JAMES
Don James & Associates, LLC
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

PHILLIP E. STEPHENSON
KYLE C. PERSINGER
Spitzer Herriman Stephenson Holderead
Musser & Conner, LLP
Marion, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

STARLITE COMMUNICATIONS, LLC, and)
AMY BRYAN,)
)
Appellants-Defendants,)

vs.)

No. 27A04-0908-CV-456)

CVS SYSTEMS, INC.,)
)
Appellee-Plaintiff.)

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0902-CC-98

December 30, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

In this interlocutory appeal, Starlight Communications, LLC, and Amy Bryan (collectively, “Starlight”) appeal the trial court’s denial of their motion to transfer venue regarding a complaint filed by CVS Systems, Inc. (“CVS”). We affirm.

Issue

The issue on appeal is whether the trial court properly denied Starlight’s motion to transfer venue.

Facts

Starlight is an Indiana limited liability company with its principal offices in Allen County. Effective January 1, 2008, Starlight entered into an “Amendment to Authorized Retailer Agreement” (“Amendment”) with CVS. The two-page Amendment provided, in part:

A. [Starlight] had previously executed a CVS Systems, Ind. Authorized Retailer Agreement (“Agreement”) effective through December 21, 2007

* * * * *

B. The Agreement provides for the appointment of [Starlight] as an Authorized Retailer for the purpose of the distribution of certain electronic products involving digital direct broadcast satellite (DBS) services under the name DISH Network, all which is provided through EchoStar Satellite Corporation (“EchoStar”).

App. p. 103. The Amendment deleted and replaced certain provisions of the original Authorized Retailer Agreement (“Agreement”). The Amendment also provided:

CVS and [Starlight] hereby acknowledge that the prior Agreement entered into by and between the parties, which

was effective as of January 31, 2006, until December 31, 2007, is hereby incorporated herein by reference and reinstated by agreement of the parties and shall remain in full force and effect in accordance with the respective terms and conditions of the Agreement, except as expressly modified herein.

Id. at 103-04. The Amendment was signed by a representative of CVS and Bryan as owner of Starlight and Bryan as personal guarantor.

The twenty-seven-page Agreement, which was not signed by the parties, contained all of the essential elements of the parties' agreements concerning Starlight's status as an authorized retailer of DISH Network services. Additionally, the Agreement provided:

In the event a lawsuit is brought relating to this Agreement or the relationship or transactions between CVS and Retailer, including but not limited to for injunctive relief, such lawsuit shall be litigated solely and exclusively before any court of competent jurisdiction located in Grant County, Indiana. The parties and their present and future Affiliates consent to the *in personam* jurisdiction of the state courts located in Grant County, Indiana for the purposes set forth in the Section 15 and waive, fully and completely, any right to dismiss and/or transfer any action based upon improper or nonpreferred venue.

Id. at 35.

A dispute arose between Starlight and CVS, and CVS filed a complaint against Starlight in Grant County. Starlight responded by filing a motion to dismiss and a motion to transfer for improper venue pursuant to Indiana Trial Rule 75. Starlight sought to have venue transferred to Allen County, its principal place of business. After a hearing, the trial court granted CVS permission to amend its complaint and denied Starlight's motion to transfer for improper venue. Starlight then requested that the trial court enter specific

findings. The trial court found that the Amendment incorporated the Agreement by reference and that the Agreement provided for venue in Grant County. Consequently, the trial court found that venue was proper in Grant County. Starlight then filed this interlocutory appeal pursuant to Indiana Appellate Rule 14(A)(8).

Analysis

Starlight argues that the trial court erred by denying its motion to transfer for improper venue. Our supreme court has held that factual findings linked to a ruling on a motion to transfer venue are reviewed under a clearly erroneous standard and rulings of law are reviewed de novo. American Family Ins. Co. v. Ford Motor Co., 857 N.E.2d 971, 973 (Ind. 2006). “If factual determinations are based on a paper record, they are also reviewed de novo.” Id.

In general, venue is governed by Indiana Trial Rule 75. However, “when the parties consent to venue in a contract, that agreement overrides the preferred venue analysis that is set forth in Trial Rule 75.” Indianapolis-Marion County Public Library v. Shook, LLC, 835 N.E.2d 533, 540 (Ind. Ct. App. 2005). “Indiana has long upheld venue and forum selections made by stipulation.” Linky v. Midwest Midrange Systems, Inc., 799 N.E.2d 55, 57 (Ind. Ct. App. 2003). Contractual provisions that seek to limit “the litigation of future actions to particular courts or places are enforceable if they are reasonable and just under the circumstances and there is no evidence of fraud or overreaching such that the agreeing party, for all practical purposes, would be deprived of a day in court.” Id. (quoting Mechanics Laundry v. Wilder Oil Co., 596 N.E.2d 248, 252 (Ind. Ct. App. 1992), trans. denied).

CVS argues and the trial court found that the venue selection provision of the Agreement controls, and venue was proper in Grant County. Starlight argues that only the Amendment was signed and that it is not bound to the terms of the Agreement. We have held that “a contract may incorporate another unsigned writing when the contract expressly incorporates the terms of the writing.” Lake County Trust Co. v. Wine, 704 N.E.2d 1035, 1039 (Ind. Ct. App. 1998). Here, the signed two-page Amendment provided:

CVS and [Starlight] hereby acknowledge that the prior Agreement entered into by and between the parties, which was effective as of January 31, 2006, until December 31, 2007, is hereby incorporated herein by reference and reinstated by agreement of the parties and shall remain in full force and effect in accordance with the respective terms and conditions of the Agreement, except as expressly modified herein.

App. pp. 103-04. Thus, the Amendment expressly incorporated the unsigned twenty-seven-page Agreement, including the venue selection provision, which required that all lawsuits related to the Agreement be filed in Grant County. Given the language of the Amendment incorporating the Agreement and its venue selection clause, we conclude that the trial court properly denied Starlight’s motion to transfer venue.¹

¹ Starlight also argues that the venue selection clause is not enforceable “without establishing such a contract provision was freely negotiated and unaffected by fraud, undue influence or overwhelming bargaining power.” Appellant’s Br. p. 8. However, Starlight did not argue to the trial court that the venue selection clause was the result of fraud, undue influence, or overwhelming bargaining power. Thus, the argument is waived. See, e.g., Swami, Inc. v. Lee, 841 N.E.2d 1173, 1180 (Ind. Ct. App. 2006) (holding that the appellant had waived an argument by failing to assert it before the trial court), trans. denied. Moreover, Starlight presented no evidence to support this argument and relies only upon its counsel’s assertion at the hearing that Starlight was unaware of the Agreement.

Conclusion

Venue of CVS's complaint against Starlight was proper in Grant County. The trial court properly denied Starlight's motion to transfer venue to Allen County. We affirm.

Affirmed.

MATHIAS, J., and BROWN, J., concur.